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CHARLES ELMORE CROPLEY

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1949

No. 512

ELLIOTT V. BELL, Superintendent of Banks of the  
State of New York, as Liquidator of the business and  
property in the State of New York of Yokohama Specie  
Bank, Ltd.,

*against*

*Petitioner,*

EUGENE T. SINGER,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF  
APPEALS OF THE STATE OF NEW YORK

**BRIEF OF RESPONDENT IN OPPOSITION**

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February 2, 1950

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of the State of New York, as Liquidator  
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Ltd.,

*Petitioner,*

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**BRIEF OF RESPONDENT IN OPPOSITION**

**Opinions Below**

The case was twice reviewed by the Court of Appeals of New York. The opinion upon the present appeal is reported: 299 N. Y. 113 (R. 530)\*; motion for re-argument denied, 300 N. Y. 549 (R. 586). The opinion on the prior appeal is reported: 293 N. Y. 542 (R. 525); motion for re-argument denied, 294 N. Y. 689. An amendment of the remittitur upon the present appeal is reported: 299 N. Y. 791 (R. 541). The Appellate Division of the New York Supreme Court rendered no opinion upon the present appeal; the opinion of trial term was not reported. Upon the prior

\*Unless otherwise noted, figures in parentheses refer to pages of the record on appeal; figures in brackets refer to pages of the record showing receipt of a document in evidence.

appeal no opinion other than the opinion of the Court of Appeals was officially reported. The opinion rendered at Special Term, New York Supreme Court, was unofficially reported: 47 N. Y. Supp. 2d, 881; the Appellate Division affirmed without opinion.

### **Jurisdiction of this Court**

The jurisdiction of the Court is invoked under the Act of June 25, 1948, c. 646, 63 Stat. 929, 28 U. S. C., Section 1257.

### **Question Presented**

A statement of the question presented which is both brief and adequate cannot be made. The question actually presented is as follows:

Whether Executive Order No. 8389 and the rules and regulations adopted pursuant thereto prevented the creation or accrual of a claim against The Yokohama Specie Bank, Ltd. which, within the meaning of Section 606(4)(a) of the New York Banking Law, arose out of a transaction with the Bank's New York Agency, under the following circumstances:

First, the transactions underlying the claim were initiated by contracts entered into by the Bank and plaintiff's assignor in Japan prior to the extension of foreign funds control to Japan or its nationals, which contracts were performed by plaintiff's assignor, Standard-Vacuum Oil Co., by payments to the Bank in Japan before transactions in that nation were brought within the reach of foreign funds control by the Trading with the Enemy Act, as amended;

Second, the only acts or transactions performed or participated in by the Bank's New York Agency consisted of the receipt from the Bank at Yokohama of instructions to pay, out of the Bank's general funds which the Agency already held, a stated sum in dollars to plaintiff's assignor (Standard) at New York, and the Agency's advice to plaintiff's assignor that it would make the payment if licensed by the United States Treasury to do so;

Third, such instructions were received and such advice was sent by the Agency to plaintiff's assignor while a supervisor appointed by the United States Treasury was in control of the Agency, and such advice was sent by the Agency pursuant to general authority by the supervisor to its employees.

A determination of the question in favor of the Superintendent's contentions would involve, directly, the provision from Section 7(b) of the Trading with the Enemy Act which we quote below. If this application is granted, we shall argue that, in view of its provisions, the underlying right of plaintiff to payment (subject to the requirement [if applicable] for a license under Presidential authority to permit the act of payment) is not and cannot be defeated by any order, rule or regulation issued under authority of the Trading with the Enemy Act.

It is not our purpose in this brief to argue the questions of law raised by, or involved in, the application of Section 7(b) of the Act. We cite it solely for the purpose of advising this Court and the petitioner that the Section has a direct and controlling effect upon the case.

#### Statutes Involved

This appeal involves in particular Sections 5(b) and 7(b) of the Trading with the Enemy Act, Executive Order No. 8389, as amended by Executive Order No. 8832, and General Ruling No. 12 (7 F. R. 2991), and, in addition, the Rules and Regulations issued pursuant to said provisions of the Trading with the Enemy Act and said Executive Order. Relevant provisions thereof, except for Section 7(b) of the Trading with the Enemy Act, are included among exhibits annexed to the petition of the Superintendent to this Court for certiorari (pp. 25-41). The relevant provision of Section 7(b) of the Trading with the Enemy Act is as follows:

"Nothing in this Act shall be deemed to prevent payment of money belonging or owing to an enemy or ally of enemy to a person within the United States not an enemy or ally of enemy, for the benefit of such person or of any other person within the United States, not an enemy or ally of enemy, if the funds so paid shall have been received prior to the beginning of the war and such payments arise out of transactions entered into prior to the beginning of the war, and not in contemplation thereof: *Provided*, That such payment shall not be made without the license of the President, general or special, as provided in this Act."

The appeal also involves provisions of Section 606, subd. 4, of the Banking Law of the State of New York. A copy thereof is appended to the Superintendent's application for certiorari, at pages 40-41.

### The Facts\*

This action arises out of the attempt of Standard-Vacuum Oil Company, plaintiff's assignor, to send from itself at Yokohama to itself at New York, through The Yokohama Specie Bank, Ltd., the sum in dollars (\$557,-561.25) which constitutes the principal amount of plaintiff's claim. The attempt to make such remittances was lawfully initiated by four contracts executed by the Bank and Standard, at Japan, prior to the extension of foreign funds control to Japan. The contracts stated that Standard had "bought" and the Bank had "sold" stated sums in dollars, for "delivery" to Standard at New York in July or August, 1941 (R. 399-406; [502-3]).

Upon the receipt on August 29, 1941, by the Agency, from the Bank's Yokohama office, of instructions to make the payment, the Agency advised Standard both orally and in writing that it had received such instructions; and upon issuance of a license it would pay Standard (R. 36). At that time the Agency was under the control of a supervisor appointed by the United States Treasury, and a corps of 13 or 14 assistants (R. 279-285). The exchange of communications was carried out pursuant to general authority which the supervisor had conferred upon employees at the Agency (R. 287; 259-60), and in all probability with his actual knowledge.\*\* The dollars have not been paid. The

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\*The facts are fully stated in our Petition to this Court for Certiorari, No. 527 (pp. 7-16). Here we shall summarize those facts upon which the claim is based.

\*\*The supervisor did not deny having such knowledge; he did not remember (R. 295); it is most unlikely that the advice could have been given without his knowledge or the knowledge of his staff.

findings of fact show that no payment and no transfer of funds, accounts or credits in which the Agency has participated has actually taken place; so far as the Agency is concerned, there occurred only the receipt of instructions to pay from its main office at Yokohama, and the exchange of communications with Standard which we have described (R. 34-45).

On July 10, 1942, the Treasury issued a license to Standard at New York, authorizing it to make appropriate entries to blocked accounts in its books in the name of its Yokohama office on account of this intended remittance, the effect of which, we shall assume, was to transfer a credit in the amount of \$557,561.25 to Standard at New York (R. 411 [146]; 501 [503]).

The New York courts have now entered and affirmed a judgment which determines that plaintiff has a claim against The Yokohama Specie Bank, Ltd., for the principal sum in dollars which Standard so purchased from it, that such claim arises out of a transaction with the Bank's New York Agency within the contemplation of the New York Banking Law, and that under the Banking Law plaintiff's claim is entitled to preference against the assets in New York of The Yokohama Specie Bank, Ltd., which are now in the possession of the Superintendent of Banks as statutory liquidator (R. 91).

### ARGUMENT

The argument which follows will be directed and limited to the question whether any substantial federal question is disclosed by the Petition of the Superintendent of Banks for Certiorari, or by the Record on Appeal in this case. We shall argue that:

1. There has been no change of creditors; *Propper v. Clark*, 337 U. S. 472, is not in point.

2. There has been no change of debtors. Under New York law the claim and judgment run against the Japanese Bank and not against its New York Agency, and they are directed to be paid out of the proceeds of the Bank's business and property in New York.

3. The Bank's New York Agency has not engaged in any transfer of funds or credit, payment or other licensable transaction.

The only semblance of a federal question disclosed by the Superintendent's Petition or by the record relates to this last point. It is only a semblance. The Superintendent himself states in his Petition (p. 9): " \* \* \* the *attempted* remission of funds from Japan to New York fell squarely within the provisions of the Executive Order \* \* \*."

" \* \* \* The Court evidently *treated* the transaction in suit *as if* a cable transfer of credit from Japan to New York had been effected (notwithstanding the prohibitions of the Order), thus putting the Agency in funds to make payment to Standard [plaintiff's assignor] upon procurement of an appropriate federal license. \* \* \* " (matter in brackets and all italics ours).

It is this supposed treatment "as if" by the New York courts in interpreting provisions of the State Banking Law, and not any licensable transfer, which the Superintendent regards as raising a federal question and requests this Court to review. Substantially his entire Petition is given over to a discussion of the probable meaning of language which the Court of Appeals used in its two opinions in commenting upon the meaning of the State statutory expres-

sion: "the claim of creditors of such corporation\* arising out of transactions had by them with its New York agency or agencies \* \* \*." (Banking Law, § 606(4)(2)). We respectfully submit that that question raises no federal issue, and is not of federal cognizance.

### POINT I

#### **THERE HAS BEEN NO CHANGE OF CREDITORS; *PROPPER v. CLARK*, 337 U. S. 472, IS NOT IN POINT.**

The Superintendent states that the decision of the Court of Appeals in this case is in direct conflict with this Court's decision in *Propper v. Clark*, and with certain other decisions which he cites (Petition, p. 12), which hold, in substance, that at the times in suit there could be no *transfer of title* to funds in a blocked account, or to a blocked claim, without federal authorization under Executive Order 8389.

There has been no such transfer in this case. The transactions in suit, out of which the claim arises, were initiated by four forward foreign exchange contracts, entered into by The Yokohama Specie Bank, Ltd. and Standard in Japan, in February and March, 1941, months before freezing control was extended to Japan or its nationals. By those contracts Standard "bought" and the Bank "sold", and Standard at Yokohama subsequently paid the Bank (in yen) for the sums in dollars which in the aggregate constitute the principal amount of plaintiff's claim, for "delivery" to Standard at New York five months later. Under those contracts Standard at New York (whether or not regarded as an institution separate from Standard

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\*The foreign banking corporation is referred to; see *infra*, p. 12.

at Yokohoma) became entitled to payment of those dollars. The Treasury has licensed a transfer of credit in the amount thereof from Standard at Yokohoma to Standard at New York. As against Standard at Yokohoma (if regarded as a separate entity) the right of Standard at New York to be paid those dollars—and, therefore, its ownership of the claim against the Bank arising out of such right—has been continuously in Standard at New York since prior to freezing, and does not rest upon or involve any licensable but unlicensed transaction. The judgment determines that plaintiff—as assignee of Standard at New York under an assignment which the Superintendent does not question\*—has a claim against the Bank for those dollars, and that the claim is payable out of the assets of the Bank at New York which the Superintendent now holds as liquidator.

Thus beyond dispute there has been no unlawful transfer of title to this claim, either by the judgment or by any of the transactions which underlie it; the underlying forward foreign exchange contracts fixed the right to payment in Standard at New York, and it still remains there. What the Superintendent is actually contending is, in substance, that there has been a *change of debtors* (i.e., a substitution of the Agency for the Bank), and not a change of creditors. That situation was not presented in *Propper v. Clark*.

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\*The Superintendent's Petition points out (p. 8) that: "On August 10, 1943, Standard assigned its claim to plaintiff [Ex. 9, R. 370 (120)] retaining, however, all beneficial interest therein [Ex. J, R. 431 (156)] and on the same day this action was commenced."

## POINT II

**THERE HAS BEEN NO CHANGE OF DEBTOR.****A.****Plaintiff was a Creditor of the Japanese Bank.**

All the Superintendent's principal contentions actually and necessarily rest upon the assumption that under the New York Banking Law the New York Agency—regarded as an entity separate from the Japanese Bank—is the principal debtor against which plaintiff's claim ran, and that unless plaintiff had a claim against the Agency (regarded as such separate entity) he is not entitled to judgment. That assumption, or statement, appears repeatedly in the Superintendent's Petition (as, see pp. 2, 4, 5, 7, 9, 20). It is essential to his case, since unless the Agency assumed the role of debtor within the freezing period—particularly in the absence of a finding or proof of any actual transfer of funds or credit to it\*—he cannot possibly show a licensable transfer between banking institutions.

The claim is against the Bank, and not against its Agency in New York. The Judgment so determines. It provides (R. 91) that:

“\* \* \* plaintiff is a creditor of The Yokohama Specie Bank, Ltd., whose claim arose out of a transaction with its New York Agency and his claim is entitled to preference against the assets in New York of The Yokohama Specie Bank, Ltd., pursuant to the provisions of Section 606, Subdivision 4(a), of the Banking Law of the State of New York; \* \* \*”.

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\*Briefed in Point III, *infra*.

In so determining, the judgment follows the provisions of Section 604(4)(a) of the New York Banking Law, which at all times here relevant authorized and directed the Superintendent to pay:

"claims of creditors of such corporation arising out of transactions had by them with its New York agency or agencies; \* \* \*".

A reading of antecedent provisions of that section shows that the expression "such corporation", means "such foreign banking corporation"; that is, "any foreign banking corporation, which has been licensed by him [the Superintendent] under the provisions of this chapter \* \* \*". That meaning is emphasized by the Court of Appeals in its first opinion in this case (293 N. Y., at page 550), and in its opinion in *Banque Mellie Iran v. Yokohama Specie Bank* (299 N. Y., at page 144). In the former (*Singer*) opinion, the Court said concerning the transactions before it:

"Our conclusion is that the course of dealing which culminated in the advice to Standard by Yokohama Specie's New York Agency, given in accord with instructions from its home office in Japan, was a *transaction* had by a creditor (Standard) of a foreign corporation (Yokohama Specie) with its New York agency, within the provisions of section 606, subdivision 4, paragraph (a) of the Banking Law \* \* \*" (Italics in the original).

## B.

**Plaintiff's Claim is Payable out of Assets in New York which formerly Belonged to the Japanese Bank.**

The judgment does not direct payment of the claim against the Japanese Bank out of funds which belonged to

the New York Agency. It makes clear that, in the contemplation of the New York Banking Law, the funds in the Superintendent's possession from which the judgment is directed to be paid are funds formerly belonging to the Japanese Bank and not to its Agency (regarded as a quasi-separate banking institution having separate funds or property) and that the Superintendent is acting as liquidator of the Japanese Bank's former business and assets in New York, and not as liquidator of the New York Agency, or of its business or property. When, following the rendering of the decision of the Court of Appeals, the parties moved in that Court for amendment of the remittitur, the Court directed the court below to enter a judgment which should provide that (299 N. Y., at p. 791):

\*\*\* plaintiff recover of the defendant Elliott V. Bell, as Superintendent of Banks of the State of New York, as liquidator of the business and property in the State of New York of Yokohama Specie Bank, Ltd., the sum of \$557,561.25, without interest, which sum shall constitute a preferred claim payable out of the assets of the Yokohama Specie Bank, Ltd., in the possession of the defendant, Elliott V. Bell, as Superintendent of Banks of the State of New York, \*\*\* the payment of which, however, is subject to the provisions of Executive Order No. 8339, as amended, and the rules and regulations issued pursuant thereto. \*\*\*"

In that respect also the judgment follows the provisions of the New York Banking Law, which, in paragraph 606(4)(a), authorizes the Superintendent to "take possession of the business and property in this state of any foreign banking corporation which has been licensed by him" where

statutory grounds for such action exist, and to "liquidate the business and property of any such foreign banking corporation in accordance with the provisions of this chapter \* \* \*"

While not strictly relevant to the proper construction of the State statute or the State judgment, it is appropriate to point out that the federal authorities so understood the character and scope of the Superintendent's function as liquidator. Thus, for example, the Treasury, in a supplementary license, empowered the Superintendent "to authorize banking institutions located" in New York to pay and transfer to him, as liquidator (R. 480[333]):

"\* \* \* of the business and property in New York of \* \* \* Yokohama Specie Bank Limited \* \* \* any funds or credit balances standing in the name of or belonging to or held for the account of *the head office or any other office, branch or agency* (including, without limitation, the New York Agency) of any such foreign banking corporation: \* \* \*" (R. 480-1; italics ours).

The general license issued to the Superintendent by the Treasury, while perhaps less specific in its details, is equally clear in its general provisions. It authorizes him to liquidate "the assets, property and business in the State of New York of the following Foreign Banking Corporations in accordance with the laws of the State of New York: \* \* \* Yokohama Specie Bank, Limited." (R. 377). The words "agency", "branch" or "office", or their equivalents, are never used in this document. Its provisions nowhere suggest or imply that the scope of the license or of the Superintendent's authority as liquidator is any narrower than the quoted language states.

The argument that the authority which the Treasury conferred or intended to confer upon the Superintendent of Banks was limited to the liquidation of the business and property of the New York Agency not only contradicts the clear and unrestricted provisions of its (the Treasury's) general liquidation license but also assumes that the Treasury by its supplementary license authorized the Superintendent to collect and use funds of the Bank's head office and other branches, to which, if he were liquidator only of the Agency under the New York Banking Law, he would have had no legal right whatever.

Thus the contention that there has been a change of debtors, or that under the New York Banking Law the plaintiff must have a claim against the New York Agency in order to recover, is conclusively disproven by the judgment, by the Banking Law, by the opinion of the Court of Appeals upon the prior appeal in this case, and by its opinion in the *Banque Mellie Iran* case, all of which are squarely and unequivocally to the contrary.

### POINT III

#### **THE CLAIM DOES NOT ARISE OUT OF ANY LICENSABLE TRANSFER TO, OR INVOLVING, THE NEW YORK AGENCY.**

Upon the foregoing facts it is clear that, on August 29, 1941, Standard had a claim against the Japanese Bank, for the sum in dollars representing the principal amount of his claim. The Superintendent appears to contend that, under the Banking Law, that claim must arise out of a transaction of such character as to render the Agency—which he regards as a different bank—liable as debtor, although, as we have shown, the claim is required to be, and has been adjudged to be, against the Japanese Bank itself. Otherwise

stated, the argument in this aspect seems to be that under the Banking Law the Japanese Bank is not liable upon its own obligations, but is liable on the (supposedly separate) Agency's. In this case the argument seems to be, further, that the Agency becomes liable because of a transfer of funds or credit from the *Japanese Bank* to it, though the statute provides that liability (i.e., the claim against the foreign bank) can arise only out of a transaction between the creditor and the Agency.

In addition, the Superintendent in his Petition shows repeatedly that there has been no transfer of funds or credit to or by the Agency. Upon that point both the findings (R. 34-45) and the evidence unquestionably bear him out—there has been no such transfer. The Petition states (p. 6):

“Accordingly the agency neither debited the account of its Yokohama office nor made payment to Standard of the sum specified in the cable of August 29, 1941, but instead advised Standard orally and in writing that the instructions had been received and that upon the issuance of a license payment would be made [Ex. 7, R. 358 (119); R. 193, 208-14].”

It states also (p. 5) that plaintiff claims to be a creditor: “as a result of an *attempted* transfer of funds from Japan to New York”, and refers to the Superintendent's argument that (p. 9): “the *attempted* remission of funds from Japan to New York fell squarely within the provisions of the Executive Order. \* \* \*”. The Petition does not state that there has been any such transmission or transfer in fact.

This Court will search the Record upon Appeal in vain for any finding of fact or any conclusion of law to support the contention that any such transfer of funds or credit or any transfer, subsequent to the application of the freezing order to Japan of funds or credit or accounts or property.

involving the Agency—did occur. Every finding of fact which is in point is to the contrary (as, see fdgs. 6 and 7 (R. 36); 11 (R. 37-8) and 32 (R. 44)). The funds held in New York by the Agency for the account of the Bank's Yokohama office had been so held long prior to the receipt by the Agency on August 29, 1941, of the cable instructions from the Bank's Yokohama office to pay Standard\* and no change in that account was made by reason of such cable instructions. It is abundantly clear that the affirmance by the Court of Appeals of the present judgment does not rest upon any transfer of funds or credit after the application of the freezing order to Japan, for none was found by the courts to have taken place, and none is disclosed by the evidence.

### CONCLUSION

We respectfully submit that the case presents no substantial question of federal law, and that the Petition of the Superintendent of Banks of the State of New York for a writ of certiorari to the Court of Appeals of the State of New York should be denied.

Respectfully submitted,

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February 2, 1950

\*On August 29, 1941, there was a credit balance in such account of \$1,634,744.69 (fdg. 12, R. 38).